

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ROBERT S. FELLER, SR.  
(Claimant)

PRECEDENT  
BENEFIT DECISION  
No. P-B-114  
Case No. 71-187

S.S.A. No.

The claimant appealed from Referee's Decision No. LA-2498 which held the claimant could not establish a valid claim for benefits under section 708(a) of the California Unemployment Insurance Code and was liable for an overpayment of benefits in the sum of \$210 under section 1375 of the code.

STATEMENT OF FACTS

The claimant filed a transitional claim for benefits which was given the effective date of February 15, 1970. The week ending February 14, 1970 was considered the claimant's waiting period with respect to the present benefit year. Thereafter the claimant received unemployment compensation benefits at the rate of \$30 per week through April 4, 1970. The maximum award available to the claimant with respect to such claim was \$536, predicated upon alleged wages paid to the claimant during the base period of October 1, 1968 through September 30, 1969. All of such earnings were received by the claimant as a self-employed individual.

The claimant entered into his present occupation on January 1, 1969. He holds himself out as a management consultant doing business as U. S. Industries, International. Although the claimant's wife is considered as a partner, her sole function is as bookkeeper, with the claimant personally performing all other functions of the business. From time to time he has retained the services of public stenographers

or typists. Such services, however, were not rendered in an employment relationship inasmuch as such clerical help was obtained from independent contractors. There have been no other employees for the period under consideration.

On January 17, 1969 the claimant filed with the Department a document entitled "APPLICATION FOR ELECTIVE COVERAGE OF SERVICES OF AN EMPLOYER UNDER THE UNEMPLOYMENT INSURANCE AND DISABILITY INSURANCE PROVISIONS OF SECTION 708(a) OF THE UNEMPLOYMENT INSURANCE CODE." He represented himself to the Department in this document as an employer, and as a consequence, the Department approved the claimant's application for elective coverage by means of a letter dated February 5, 1969. This letter reads in part as follows:

"Your application to have your own services considered as subject for unemployment and disability insurance coverage under Section 708(a) of the California Unemployment Insurance Code is approved effective January 1, 1969."

The letter went on to say that the coverage would remain in effect for not less than two complete calendar years.

Concurrently with the filing of the application for elective coverage, which was mailed to the Sacramento Office of the Department on January 17, 1969, the claimant mailed a registration form to the Department's Employment Tax Office in Santa Monica. In the registration form the claimant indicated that his payroll would exceed \$100 "in any calendar quarter," and that he had or expected to have one to three employees. The Department understood from this form that the claimant was an employer and therefore granted him an employer account number.

Thereafter the claimant submitted to the Department a quarterly return for the first calendar quarter of 1969. In this return he showed himself as the sole employee of U. S. Industries, International and he indicated that his earnings were \$730 in that quarter. The claimant filed another return with respect to the

second calendar quarter in 1969. In this document he again indicated he was the sole employee of U. S. Industries, International and that his earnings for that quarter were \$341.67. The claimant then sent another return to the Department for the third calendar quarter of 1969. In this document the claimant indicated under date of October 21, 1969 that no wages had been paid during that quarter by U. S. Industries, International. The claimant submitted another return and this one pertained to the fourth calendar quarter of 1969. In this document the claimant indicated that U. S. Industries, International had paid no wages during that calendar quarter. This document was received by the Department on January 22, 1970.

With respect to the initial claim which he had filed as of February 15, 1970, the claimant received a notice of computation. This form showed that the claimant's maximum award was \$536 and that his weekly rate was \$30. After receiving this form the claimant filed a form which is entitled "Request for Reconsideration of Initial Computation." In this document he alleged that he was entitled to wage credits in the amount of \$1,798 with respect to the third calendar quarter of 1969. The claimant also submitted to the Department a corrected contribution report on February 29, 1970 with respect to the third calendar quarter of 1969. In this corrected return he indicated that U. S. Industries, International had paid wages of \$1,798 and that the person to whom these wages had been paid was the claimant.

When the Department received the request form the matter was referred to the Auditing Section of the Department to make an investigation of the claimant's business. Following the investigation the Department determined that the claimant did not qualify for elective coverage under section 708(a) of the code. It was the Department's view that the claimant had incorrectly represented his status at the outset and that the application for elective coverage should never have been granted. As a consequence, on April 27, 1970 the Department recomputed the claimant's award with the result that it was reduced to zero. The Department's entry on the request form is as follows:

"Field investigation determined you did not qualify for self coverage, therefore, no elective coverage in effect. Drawings by the owner are not wages."

It is not clear from the record when the request form was returned by the Department to the claimant. It appears probable that it was mailed to the claimant in the early part of May 1970. The notice of overpayment was issued on July 28, 1970.

It was the claimant's contention at the hearing that he had acted in good faith in his dealings with the Department and that there was no intention on his part to make misrepresentations to the Department. The claimant has further contended that the provisions of the Unemployment Insurance Code, with respect to elective coverage, were so ambiguous and unclear as to be confusing to the average person.

During the base period of his claim, which extended from October 1, 1968 through September 30, 1969, the claimant did not perform services for wages for any employer.

#### REASONS FOR DECISION

Section 708(a) of the California Unemployment Insurance Code provides as follows:

"Any individual who is an employer under this division or any two or more individuals who have so qualified may file with the director a written election that their services shall be deemed to be services performed by individuals in employment for an employer for all the purposes of this division. Upon the approval of the election by the director the services of such individuals shall be deemed to constitute employment for an employer for all the purposes of this division.  
. . ."

Section 708.5 of the code provides in pertinent part as follows:

"Any individual who is self-employed, who is not an employer . . . and who receives the major part of his remuneration from the trade, business, or occupation in which he is self-employed, may file with the director a written election that his services in connection with his trade, business, or occupation shall be deemed to be services performed by an individual in employment for an employer for the purposes of Part 2 only of this division. Upon the approval of the election by the director, the services of such a self-employed individual in connection with his trade, business, or occupation shall be deemed to constitute employment for an employer for the purposes of Part 2 only of this division. . . ."

Part 2 of the division in question pertains solely to unemployment compensation disability benefits.

Section 675 of the code defines the term "employer" as "any employing unit, which for some portion of a day, has within the current calendar year or had within the preceding calendar year in employment one or more individuals and pays wages for employment in excess of one hundred dollars (\$100) during any calendar quarter."

The referee found, and we concur, from the facts presented by the instant appeal that the claimant was a self-employed individual and was not an employer as defined above. While under the relevant provisions of the code the claimant could qualify for elective coverage for disability compensation benefits, he is not eligible for elective coverage for unemployment compensation benefits. The referee further found that the Department erroneously granted the claimant's application for elective coverage for unemployment compensation benefits through a misunderstanding. The misunderstanding, however, resulted from the information supplied to the Department by the claimant at the time the initial application for such

coverage was filed. Once the misunderstanding was brought to light as a result of the investigation, the Department acted properly in cancelling the claimant's elective coverage.

Section 1281(a) of the code provides that an individual cannot establish a valid claim or a benefit year during which benefits are payable unless he has during such base period been paid wages in employment by employers of not less than \$720.

It is clear that the claimant's sole remuneration during the base period under consideration was profits from self-employment. Since the claimant had not received wages from employment, he could not establish a valid benefit year and such benefit year must be cancelled. Accordingly, the \$210 heretofore paid as benefits to the claimant represents an overpayment.

Section 1375 of the California Unemployment Insurance Code provides that a claimant who has received benefits to which he is not legally entitled shall be liable for the overpayment unless such benefits were received other than through fraud, misrepresentation or wilful nondisclosure on the part of the claimant and were received without fault on the part of the claimant and recovery would be against equity and good conscience.

Fault is something less than fraud, misrepresentation or wilful nondisclosure, and implies a degree of negligence or blame attributable to the recipient of erroneous payments such as failure to disclose to the Department facts which were known, or should have been known, to be material in determining eligibility for benefits.

We find with the referee that the claimant was not without fault in filing an application for elective coverage and registering with the Department as an employer. The claimant held himself out to the Department as the employer of one to three employees.

The claimant did not at any time have an employee nor did he contemplate hiring employees. Inasmuch as the claimant failed to accurately provide the Department with the facts of his status, he was at fault within the meaning of section 1375 of the code and the claimant is liable for the repayment of benefits erroneously paid.

#### DECISION

The decision of the referee is affirmed. The claimant cannot establish a valid claim for benefits under section 708(a) or 1281(a) of the code and the benefit year established effective February 15, 1970 is cancelled. The claimant is liable for an overpayment of \$210 under section 1375 of the code.

Sacramento, California, August 31, 1971.

#### CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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